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Nikki R. Jackson
Secretary

MEMORANDUM

PERSONNEL MEMO 09-01

TO: Cabinet Secretary
Agency Heads
Constitutional Officers
Human Resource Administrators

FROM: Nikki R. Jackson, Secretary 

RE: Amendments to the Family and Medical Leave Act (FMLA)

DATE: January 15, 2009

Please be advised of the following amendments to the Family and Medical Leave Act (FMLA), which are effective January 16, 2009. These amendments aim to improve communication between employees, employers and health care providers, and also provide clarification on the recent military family leave provisions contained in the National Defense Authorization Act (NDAA).

The Personnel Cabinet will continue to provide FMLA guidance by offering a training course on specific issues that face Kentucky state employment. This training will take place in February 2009 and additional information will be provided in the near future. In the meantime, if you have any questions about this material, please contact Dinah Bevington, Acting Executive Director, Office of Legal Services for the Personnel Cabinet, at (502) 564-7430.

HIGHLIGHTS OF THE REGULATORY CHANGES

Light Duty: The time that an employee spends performing “light duty” work does not count against an employee’s FMLA leave entitlement. Also, if an employee accepts a light duty assignment, the employee does not waive any future rights, including the right to job restoration which is held in abeyance while the employee performs light duty or until the end of the applicable 12-month FMLA leave year.

Waiver of Rights: Employees may voluntarily settle or release their FMLA claims without court or Department of Labor approval. Employees may not prospectively waive their rights.

Serious Health Condition: The six main definitions of a “serious health condition” have not changed. Additional clarification was provided on the following components:

- When the definition requires “two visits to a health care provider,” these visits must occur within 30 days of the beginning of the period of incapacity.
- The first visit to the health care provider must take place within seven days of the first day of incapacity.
- “Periodic visits” for chronic serious health conditions are at least two visits to a health care provider per year.

Employer Notice Obligations: The final rule consolidates all the employer notice requirements and reconciles some conflicting provisions under the current regulations. Employers are required to provide employees with four types of notice: a general notice about the FMLA (through a poster, as well as either an employee handbook or upon hire), an eligibility notice; a rights and responsibilities notice; and a designation notice. Employers now have five business days to provide this notice.

Employee Notice: An employee needing FMLA leave must follow the employer’s usual and customary call-in procedures for reporting an absence, absent unusual circumstances. The final rule also highlights (without changing) the existing consequences if an employee does not provide proper notice of his or her need for FMLA leave.

Medical Certification Process (Content and Clarification): If an employer deems a medical certification to be incomplete or insufficient, the employer must specify in writing what information is lacking, and give the employee seven calendar days to cure the deficiency. The employer’s representatives may contact the health care provider for additional information. Only the following people may contact the employee’s health care provider for clarification and authentication purposes: a health care provider, human resource professional, a leave administrator, or a management official. Under no circumstances shall the employee’s direct supervisor contact the health care provider, and the employer may not ask health care providers for additional information beyond that required by the certification form. There are now separate forms for the employee and covered family members, and health care providers are permitted (but not required) to provide a diagnosis of the health condition as part of the certification.

Medical Certification Process (Timing): Employers may request a new medical certification each leave year for medical conditions that last longer than one year.

Fitness-For-Duty Certifications: There are two changes to the fitness-for-duty certification process. First, an employer may require that the certification specifically address the employee’s ability to perform the essential functions of the employee’s job. Second, where reasonable job safety concerns exist, an employer may require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave.

Military Family Leave: Under military caregiver leave, an eligible employee (including next of kin) may take up to 26 workweeks of leave during a 12-month period to care for a covered service member. An employer may require certification of the need for caregiver leave and an optional form (WH-385) is available for use. The 12-month time period for caregiver leave is separate and begins with the first date of caregiver leave and ends 12 months later.

Eligible employees may also take up to 12 weeks of FMLA leave for a “qualifying exigency” arising from the fact the employee’s spouse, child or parent is on active duty or has been called to active duty in support of a “contingency operation”. Qualifying exigency leave only applies to families of members in the National Guard and reserves and certain retired members of the military. This leave also applies only to a federal call to duty or a state call under order of the President. The regulations provide the following “specific and exclusive” list of reasons for qualifying exigency leave, which includes: short notice deployment; military events and related activities; childcare and school activities; financial and legal arrangements; counseling; rest and recuperation; post-deployment activities; and additional purposes arising out of the call to duty, as agreed on by the employee and employer. An optional certification form (WH-384) is available for use.